Third, the Division's response to the petition referred to a telephone conversation on January 6, 1983, between Mr. Nelson and Denver counsel. During this conversation, counsel allegedly was reminded of the January 20 hearing date.

The defendants did not directly respond to this allegation. Instead, they contended in their answer to the Division's response that such a statement was "irrelevant to the issue of whether the Hearing should be reopened, so long as Colorado counsel believed, with good reason, that the hearing had been continued" (Defendants' Answer to the Response of the Division, p. 2).

If counsel was told on January 6 that the hearing was still scheduled for January 20, then obviously he did not have good reason to believe that the hearing had been changed. It appears to us that this telephone conversation, a factor so potentially damaging to the

defendants' position, should have been directly addressed in their answer.

Conclusion

Based on the record, it is quite apparent that Blinder, Robinson and its agents committed numerous acts made unlawful by the Virginia Securities Act. Since much of the evidence presented by the Division was based on information supplied by the Company, it is difficult to imagine that the defendants would seek to impugn it or to deny it. Nevertheless, they had the opportunity to have their "day in court", but failed to take advantage of it. Although we appreciate the defendants' desire to have a second opportunity to present evidence, "another bite at the apple", we have been given no credible reason why justice requires it or why the denial thereof is an abuse of our discretion.

SHANNON, Chairman, concurs.

BRADSHAW, Commissioner, did not participate in the hearing or decision of these cases.

* * * * *

Respectfully Submitted,

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NO. 83-1991

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BLINDER, ROBINSON & COMPANY, INC., et al.,
Petitioners,

v.

STATE CORPORATION COMMISSION OF VIRGINIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners were deprived of the due process of law required by the fourteenth amendment of the United States Constitution when the State Corporation Commission of Virginia denied their post-hearing requests to reopen the hearing on the orders to show cause and for an evidentiary hearing on their counsel's misunderstanding of the date of the show cause hearing.

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Virginia reproduced on pages A-1 through A-14 of Petitioners' Appendix [hereinafter cited as Pet. App.] is reported at 313 S.E.2d Adv. Sh. 652 (1984) [hereinafter cited as 313 S.E.2d].

JURISDICTION

In addition to the information contained in the Jurisdiction section of the Petition for a Writ of Certiorari [hereinafter Petition and cited as Pet.], it is noted that the Petition was filed as of June 6, 1984.

STATEMENT OF THE CASE

The State Corporation Commission of Virginia [hereinafter Commission

or SCC] agrees, for the most part, with the Statement of the Case presented on pages 3-11 of the Petition. However, there are several places where amplification and comment are deemed necessary.

To supplement the factual background, it should be pointed out that Blinder, Robinson & Company, Inc. [hereinafter Blinder, Robinson] is a securities broker-dealer firm located in Englewood, Colorado. During the period of time relevant to this matter, Petitioners Siskind, Nagel, Lavin and Sager were employed as sales agents by Blinder, Robinson.[1]

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[1] The corporate Petitioner and the individual Petitioners, collectively, will hereinafter be referred to as Petitioners.

On October 15, 1982, the SCC entered against each of the Petitioners an Order to Show Cause that informed the recipient of the facts alleged to constitute violations of the Virginia Securities Act. Also, the orders required Petitioners' to appear before the Commission on January 20, 1983, to show cause why they should not be enjoined and penalized on account of the alleged violations (Pet. App. A-40). Notice of the hearing, in the form of an attested copy of each order, was duly served on each Petitioner (Pet. App. A-19, A-24, A-28, A-32, A-36).

On November 8, 1982, the Division of Securities and Retail Franchising [one of the administrative divisions of the SCC and hereinafter referred

to as Division] received a letter from Blinder, Robinson's "house" counsel, Mr. George S. Yochmowitz, which requested that the time of the January 20 hearing be changed from 10:00 a.m. to 2:00 p.m. Mr. Taylor J. Nelson, Broker-Dealer Examination Coordinator of the Division, telephonically advised Mr. Yochmowitz to contact Mr. Joel H. Peck, Associate General Counsel of the Commission, in regard to continuing the time of the scheduled hearing.[2] By letter

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[2] These facts are not contained in Petitioners' Appendix. They are set out in the Division's "Response to Petition to Reopen Hearing and to Schedule a Date" filed with the SCC, which is reproduced beginning on page 51 of the Joint Appendix filed with the Supreme Court of Virginia [hereinafter cited Va. Jt. App.]. These facts were not controverted below.

dated November 22, 1982, Mr. Peck responded to the Yochmowitz letter of November 8. The Peck letter, which was accompanied by a copy of the Commission's Rules of Practice and Procedure, made reference specifically to Commission Rule 6:6, which applies to requests for a continuance (Pet. App. A-12, A-48-49; 313 S.E.2d at 655). Petitioners did not contact Mr. Peck or file a motion for a continuance, and the hearing remained set for 10:00 a.m. on January 20, 1983.

As none of Petitioners appeared either in person or by counsel at the hearing on January 20, the Commission noted that they were in default. However, the Division's evidence

was taken and, in the words of the Virginia Supreme Court, the SCC's adjudications were "in the nature of judgments by default" (Pet. App. A-1; 313 S.E.2d at 653).

On page 4 of the Petition, the first full paragraph begins: "Without the knowledge of the Petitioners, a hearing (the 'Hearing') was held before the Commission on January 20, 1983 . . .." The SCC disputes the asserted conclusion that the hearing was conducted "[w]ithout the knowledge of the Petitioners."

The Commission also disputes the asserted conclusion found on pages 6-7 of the Petition that Lowery's Affidavit and the attachments thereto "established" that Lowery was telephonically "advised that the Hearing

would not be held on January 20, 1983 as originally scheduled, but would be continued to a later date."

Lastly, the SCC disagrees with the following statement in the Petition at page 7: "While the Petition [to Reopen Hearing and to Schedule a Date] did not specifically refer to the due process clauses of the United States and Virginia Constitutions, the averments clearly were based upon due process grounds, and were so understood by the Commission."[3] Neither the pleadings filed with the SCC by Petitioners and the Division

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[3] Since the Petition filed with this Court alleges a violation of only amend. XIV, § 1 of the U.S. Constitution, there seems to be no reason for the reference to the Va. Constitution.

nor the Commission's orders or opinion makes any reference to "due process grounds." As a matter of fact, the Petition to Reopen and the Affidavit attached thereto argued that it was "in the interests of justice and equity" to grant the requested relief (Va. Jt. App. 45-6, 48). Consequently, the Order Denying Petition contains the finding "that good cause . . . has not been shown" (Pet. App. A-17) and the Commission's opinion concludes by stating "we have been given no credible reason why justice requires [granting the Petition to Reopen] or why the denial thereof is an abuse of our discretion" (Pet. App. A-51).

Petitioners raised for the first time the due process clauses of the United States and Virginia Constitutions when they filed their Assignments of Error with the Supreme Court of Virginia on September 22, 1983 (Pet. App. A-5-6; Pet. 10; 313 S.E.2d at 654).

SUMMARY OF ARGUMENT

Petitioners claim that their right to due process of law, which is guaranteed by the fourteenth amendment of the United States Constitution, was violated because (1) they were not afforded the opportunity to appear before the SCC and be heard and (2) the SCC abused its discretion by denying Petitioners' post-hearing requests to reopen the show cause

hearing and to present evidence on their counsel's misunderstanding about the hearing date being continued. This contention is meritless.

The facts show that Petitioners were given adequate notice of the scheduled hearing and the opportunity to appear and to defend themselves. Furthermore, they were timely informed of the Commission's rule concerning the procedures to be followed for obtaining a postponement of the hearing. Petitioners did not adhere to these procedures, or those generally utilized for seeking a continuance. Two weeks before the hearing date, their counsel was verbally reminded of the scheduled hearing. Petitioners failed to appear in any manner at the hearing, and

judgments by default were ultimately entered against them. Based on these facts, Petitioners were deemed to have waived their right to a hearing, a conclusion which is consistent with the principles expressed in Boddie v. Connecticut, 401 U.S. 371 (1971).

Petitioners' contention that they were denied due process of law because the SCC abused its discretion by rejecting their post-hearing requests is also without merit.

Whether to reopen a case is a question addressed to the judicial discretion of the tribunal. Before granting a request to reopen, the tribunal should be given an adequate reason for doing so - i.e., that

the requesting party has a sufficient excuse for not introducing its evidence before and that such evidence would materially influence the decision of the court. Since Petitioners made neither showing, the Commission was justified in denying the request.

The SCC also acted properly in refusing to schedule a hearing on counsel's alleged misunderstanding about the hearing date. The facts show that such a hearing was not necessary or warranted.

Counsel's "misunderstanding" was based solely on a telephone conversation with an administrative employee of the Commission who made it clear that he, personally, could not continue the hearing. This conversation occurred one month before

the scheduled hearing. Two weeks later, this same employee verbally reminded counsel that the hearing was still set for the date it was originally scheduled. Despite this information and the fact that counsel never received any written confirmation of a continuance, counsel did not appear at the hearing and did not inquire about the hearing date until the day it was scheduled. This telephonic inquiry was made several hours after the hearing had concluded. In addition, Petitioners were sent a copy of the Commission's Rules of Practice and Procedure two months prior to the hearing date. However, neither they nor their counsel followed the rule applicable to seeking a

continuance. On these facts, the SCC acted reasonably when it denied the request for an evidentiary hearing on counsel's "misunderstanding."

Consequently, Petitioners were not denied due process of law and the Commission did not abuse its discretion. Therefore, the Petition for a Writ of Certiorari should not be granted.

ARGUMENT

Opportunity for a Hearing

Petitioners contend that the Supreme Court of Virginia erred in affirming the SCC's denial, without a hearing, of their Petition to Reopen Hearing and to Schedule a [Hearing] Date and of their request for an evidentiary hearing submitted after

they had filed the Petition to Reopen. This denial, Petitioners claim, caused them to suffer judgments by default without being given the opportunity to appear and to defend themselves, which is contrary to the provisions of the due process clause of the fourteenth amendment of the United States Constitution. There is no merit to this position.

The crucial question in this matter is whether Petitioners waived the opportunity to participate in the show cause hearing. As this Court has observed, such an opportunity is not an absolute, irrevocable right:

> Due process does not, of course, require that the defendant in every civil case actually have a hearing

> on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance . . . or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication . . ..

Boddie v. Connecticut, 401 U.S. 371, 378 (1971) (emphasis added; citations omitted);[4] see also Central Operating

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[4] Petitioners hint that the SCC proceedings against them were quasi-criminal (Pet. 17). The SCC has taken the position that such proceedings under the Virginia Securities Act are civil in character, Commonwealth ex rel. SCC v. Astro Tree & Lawn Service, Inc., 1976 Ann. Rep. of the SCC 69, 73-74, aff'd on other grounds sub nom. Pollok v. Commonwealth, 217 Va. 411, 229 S.E.2d 858 (1976). Whether this case is viewed as quasi-criminal or civil, the principle expressed in Boddie is applicable here. See Yakus v. United States, 321 U.S. 414, 444 (1944) (a constitutional right can be forfeited in a criminal, as well as a civil, proceeding by failure to timely assert the right).

Co. v. Utility Workers of Am., 491 F.2d 245, 251 (4th Cir. 1974) ("Default judgments entered for failure, after proper service, to answer within the time allowed do not violate due process."). The Virginia Supreme Court accurately summarized this point when it said: "The failure to appear after due notice, or the unjustifiable violation of some procedural rule affecting the orderly adjudication of cases, may result in a waiver of the hearing required by due process and an entry of judgment by default" (Pet. App. A-8; 313 S.E.2d at 654) (citations omitted).

The crux of Petitioners' argument is that their "failure to appear was based on a reasonable and excusable

misunderstanding [about the January 20 hearing being continued]" (Pet. 13). The facts show that any such "misunderstanding" was neither reasonable nor excusable.

The record discloses that Petitioners' Colorado counsel, Mr. Lowery, was aware that the SCC employee with whom he spoke on December 20, 1982, Mr. Nelson, was employed by the Commission in an administrative capacity. Counsel also was informed at this time that the legal aspects of the show cause proceedings were attended to by a member of the SCC's legal staff (Pet. App. A-9-10, A-47-48; 313 S.E.2d at 654-55). In addition, Mr. Lowery knew, or should have known, that the proceedings had been instituted

by formal Orders to Show Cause, and not by informal means such as letters, telegrams or telephone calls. This latter fact should have caused Mr. Lowery to realize that the Commission does not treat such proceedings in a casual fashion and, therefore, that continuances would be effected in the same manner as the proceedings were instituted - i.e., by order.

In light of his profession, counsel surely is familiar with the procedures generally followed in this country for obtaining a continuance of a docketed case. Initially, the moving lawyer usually communicates with the attorney for the other party. Whether or not this is done, the movant files a written motion with

the tribunal. 17 Am. Jur. 2d Continuance § 43 (1964). This is required whether the case is before an administrative or judicial forum. 2 Am. Jur. 2d Administrative Law § 426 (1962). Under normal circumstances, the tribunal's decision on the motion is announced by written order. See 17 Am. Jur. 2d Continuance § 49 (1964) ("Where there has been a grant of a continuance, a proper record of the proceedings should . . . be made, in order to avoid difficulties from possible misunderstanding as to the time to which a cause has been postponed; . . ." (emphasis added; footnote omitted)). The issuance of a written order is contemplated by Rule 6:6 of the SCC's Rules of Practice and

Procedure. The text of Rule 6:6 is contained in the appendix hereto, A-1.

As suggested by the foregoing, Mr. Lowery ought to have recognized that in order to secure a continuance of the show cause hearing, something more formal and concrete than a telephone conversation with a member of the Commission's staff, especially a nonlegal employee without any apparent authority to bind the Commission, was required. Notwithstanding his failure to follow the usual preliminary procedures, counsel's curiosity should have been aroused when, within a reasonable period of time after December 20, he had not received an order, or any other documentation, confirming the

continuance. However, Petitioners' counsel did not inquire further about the matter until January 20, when Mr. Lowery's associate called the Commission's staff attorney several hours after the hearing had been concluded (Pet. 8).

These facts compel the conclusion reached by the Virginia Supreme Court, to wit:

> It is not reasonably conceivable that an attorney, exercising due care for his client's interests, would accept . . . an equivocal statement from one without any apparent authority and act upon the statement with complete confidence that a binding agreement had been reached concerning a continuance. Neither is it reasonably conceivable that, following his conversation with Nelson, Lowery would fail to contact the Commission

> before the scheduled hearing date to ascertain whether the matter had in fact been continued. Both these lapses constitute inexcusable neglect amounting to a waiver of 'the hearing required by due process.' Boddie, 401 U.S. at 378, 91 S.Ct. at 786.

Pet. App. A-10-11; 313 S.E.2d at 655.

Another reason for concluding that Petitioners' failure to appear was not justifiable is set forth in 21 C.J.S. Courts § 176(b) (1940): "Parties and their counsel are bound to take notice of court rules, and ignorance thereof ordinarily is no excuse for noncompliance therewith."

Although this rule may sound harsh in theory, it is especially apt under the facts of this case.

Petitioners had in their possession, since the end of November 1982, a copy of the SCC's Rules of Practice and Procedure. However, Mr. Lowery admitted that he did not procure these rules until January 21, 1983, the day following the hearing. Had he obtained the Commission's rules from Petitioners at an earlier point in time, and reviewed them, he would have realized that, as he had not received an order of continuance (see SCC Rule 6:6), the cases were still set to be heard on January 20, 1983. It seems elementary that an attorney who fails to educate himself about the rules of practice of the forum in which he intends to appear should not be heard to complain about the consequences of his neglect.

The final point related to this facet of the case that deserves attention is the alleged conversation on January 6, 1983, between Mr. Lowery and Mr. Nelson (Pet. 8). In its Response to the Petition to Reopen, the Division asserted that during this conversation, Mr. Nelson reminded Colorado counsel of the hearing scheduled for January 20 (id.). Actual notice of this nature obviously would eviscerate Petitioners' argument. However, they have not controverted this allegation, either in their Answer to the Division's Response filed with the SCC, in their brief filed with the Supreme Court of Virginia, or in their Petition for a Writ of Certiorari (id.).

Petitioners also contend that "although [Mr. Lowery's] assumption [of a continuance] was incorrect, his client[s] . . . should be relieved from bearing the burden of his misunderstanding" (Pet. 26). Although this plea resembles an appeal to a court of equity rather than a due process of law issue, the facts are against Petitioners.

As heretofore noted, on November 22, 1982, the SCC's staff counsel sent a letter to Mr. Yochmowitz, Blinder, Robinson's house counsel, which directed his attention to Rule 6:6 of the Commission's Rules of Practice and Procedure. A pamphlet containing all of the SCC's Rules of Practice and Procedure accompanied the letter.

Staff counsel's letter was in response to a letter from Mr. Yochmowitz in which, among other things, he had requested that the time of the hearing be changed from 10:00 a.m. to 2:00 p.m.

The obvious significance of the foregoing is that Petitioners, by written notice sent directly to their house counsel almost two months prior to the hearing, were advised of the Commission's regulations concerning postponements of scheduled hearings. Despite this notice, they failed to timely request a continuance in proper manner.

Furthermore, as previously noted, parties to a proceeding are responsible for knowing the rules of the forum

(see 21 C.J.S. Courts, supra) and failure to comply with them can result in loss of the parties' rights (see Boddie, 401 U.S. at 378).

Petitioners were furnished notice of the proceedings and of the Commission's Rules in sufficient time to permit them to file any motions they deemed necessary and to make appropriate arrangements for their defense. Having failed to act opportunely, properly and prudently, Petitioners waived the opportunity to be heard.

Alleged Abuse of Discretion

Petitioners also assert that they were denied due process of law because the Commission abused its discretion by not reopening the hearing and by refusing to hold an evidentiary

hearing about the December 20 telephone conversation. This assertion is baseless.

As a general rule, the decision with respect to reopening a case prior to the entry of judgment is in the judicial discretion of the trial tribunal. 88 C.J.S. Trial § 104 (1955). This rule is followed in Virginia. Laughlin v. Rose, 200 Va. 127, 129, 104 S.E.2d 782, 784 (1958).

Substantively, an application to reopen a case "should show a sufficient excuse for not introducing the evidence before, and also that it would materially influence" the court's final decision. 88 C.J.S., supra § 112.

Application of these standards to the germane facts leads to the conclusion that Petitioners were not entitled to have the hearing reopened, and that the Commission did not abuse its discretion by denying such relief.

As pertains to a showing that Petitioners' evidence would have affected the outcome of the show cause proceedings, it should be noted that they filed post-hearing pleadings on two separate occasions - their Petition to Reopen on March 1 (Pet. App. A-3, A-44; Pet. 5; 313 S.E.2d at 653) and their Answer to the Division's Response to the Petition on March 22 (Pet. App. A-45; Pet. 8-9). The first of these documents was filed

six weeks subsequent to the hearing and two weeks after Petitioners' Virginia counsel obtained copies of the Division's exhibits introduced at the hearing (Va. Jt. App. 56). However, neither the Petition to Reopen nor the Answer discusses, or even alleges, the evidence Petitioners were prepared to present, or that their evidence would "materially influence" the Commission's determination. Even if Petitioners' excuse for not appearing at the hearing is deemed adequate, their failure to disclose the evidence, if any, they intended to introduce was sufficient

reason for the SCC to deny their Petition to Reopen.[5]

The other necessary showing - sufficiency of the excuse for not timely introducing evidence - has been thoroughly addressed, supra at 18-29.

The second asserted abuse of discretion is the SCC's denial of Petitioners' request to present evidence

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[5] Petitioners had a third opportunity to inform the Commission of the evidence they were prepared to introduce - under Rule 7:9 of the SCC's Rules of Practice and Procedure, they could have filed petitions for rehearing within 21 days after entry of the Final Orders and Judgments. However, such petitions were not filed. The text of Rule 7:9 as relevant here is contained in the appendix hereto, A-2.

as to what was said about a continuance during the December 20 telephone conversation. The events previously discussed, which are summarized below, indicate that such an exercise would have been superfluous and, therefore, the Commission did not abuse its discretion.

Mr. Lowery knew, as a result of the conversation in December, that Mr. Nelson, personally, was not going to continue the hearing date, and that the Commission employee who would be involved in any such request was staff counsel. Mr. Lowery never received any documentation, or other form of notice, that the hearing had been postponed. To the contrary, on January 6, 1983, he

was verbally reminded by Mr. Nelson that the hearing was still scheduled for January 20. For almost two months prior to the hearing, Petitioners had a copy of the SCC's Rules of Practice and Procedure, yet neither they nor Mr. Lowery followed the rule applicable to seeking a continuance. Notwithstanding these circumstances, Petitioners' Colorado counsel waited until the afternoon of January 20 to contact the Commission's attorney and inquire about the status of the hearing date. Surely, in the context of such facts, the SCC's denial of the request for the evidentiary hearing cannot reasonably be deemed to have been an abuse of discretion.

The Virginia Supreme Court reached this conclusion based solely on Mr.

Lowery's Affidavit: "And the fault appears so clearly from Lowery's affidavit that the Commission was fully justified in refusing . . . to hear Lowery's testimony." (Pet. App. A-11; 313 S.E.2d at 655).[6]

It is again clear from the facts of this matter that the SCC did not abuse its discretion when it denied the relief sought by Petitioners. The Commission's action was sound and proper in view of the facts and applicable law.

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[6] This language clearly contradicts Petitioners' assertion that "[t]he Virginia Supreme Court does not address [the evidentiary hearing] in its Opinion" (Pet. 19).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Joel H. Peck*
Associate General Counsel

* Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 1984, three copies of the foregoing Brief in Opposition were mailed, first class postage prepaid, to Richard M. Price, Esquire, Wallerstein, Goode & Dobbins, Counsel for Petitioners, Post Office Box 242, Richmond, Virginia 23202.

Joel H. Peck

Joel H. Peck

APPENDIX

6:6. Postponements. For cause shown, postponements, continuances and extensions of time will be granted or denied at the discretion of the Commission, except as otherwise provided by law. Except in cases of extreme emergency, requests hereunder must be made at least fourteen (14) days prior to the date set for hearing. In every case in which a postponement or continuance is granted it shall be the obligation of the requesting party to arrange with all other parties for a satisfactory available substitute hearing schedule. Absent the ability of the parties to agree, the Commission will be so advised and a hearing date will be set by the Commission. In either case, the requesting party shall prepare an appropriate draft of order for entry by the Commission, which order shall recite the agreement of the parties, or the absence thereof, and file the same with an additional copy for each counsel of record as prescirbed in Rule 5:13. Following entry, an attested copy of the order shall be served by the Clerk on each counsel of record [emphasis added].

7:9. Petition for Rehearing or Reconsideration. All final judgments, orders and decrees of the Commission . . . shall remain under the control of the Commission and subject to be modified or vacated for twenty-one (21) days after the date of entry, and no longer. A petition for a rehearing or reconsideration must be filed within said twenty-one (21) days, but the filing thereof will not suspend the execution of the judgment, order or decree, nor extend the time for taking an appeal, unless the Commission, solely at its discretion, within said twenty-one (21) days, shall provide for such suspension in an order or decree granting the petition. A petition for rehearing or reconsideration must be served on all other parties as provided by Rule 5:12, but no response to the petition, or oral argument thereon, will be entertained by the Commission. An order granting a rehearing or reconsideration will be served on all parties by the Clerk.